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No. 84-1097

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPAR W. WEINBERGER,
SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Air Force may constitutionally prohibit an Orthodox Jewish psychologist from wearing a "yarmulke" — an unobtrusive skullcap which is part of his religious observance — while he is in uniform on duty at a military hospital.

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No. 84-1097

IN THE
Supreme Court of the United States

October Term, 1985

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPAR W. WEINBERGER,
SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 734 F.2d 1531. The opinion of the district court (Pet. App. 28a-34a) is reported at 530 F. Supp. 12.

JURISDICTION

The decision of the court of appeals was issued on May 8, 1984. On August 10, 1984, the court of appeals denied a timely petition for rehearing and suggestion for

rehearing *en banc* (Pet. App. 21a-27a). On November 1, 1984, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including December 10, 1984 (Pet. App. 37a). On December 3, 1984, Chief Justice Burger further extended the time within which to file a petition for a writ of certiorari to and including January 7, 1985 (Pet. App. 38a). The petition was filed on January 7, 1985, and certiorari was granted on June 17, 1985. The jurisdiction of this Court rests on 28 U.S.C. §1254.

STATEMENT

Petitioner is an Orthodox Jew who received rabbinical training and was ordained as a rabbi in 1970 (J.A. 154).[1] He served for two years as a chaplain in the United States Navy, and thereafter decided to study clinical psychology (J.A. 156-158). He enrolled in the Armed Forces Health Professions Scholarship Program and took courses in clinical psychology at Loyola University of Chicago. In September 1977, after graduating with a Ph.D. in psychology, petitioner entered on active duty with the Air Force, as a clinical psychologist, at March Air Force Base in California (J.A. 160).

From the time of his initial Air Force enrollment until early 1981 petitioner kept his head covered, as he had done all his adult life and as is traditional among Orthodox Jews.[2] This included the hours when he was on duty at the Air Force hospital (J.A. 161-167). When he was out of doors, petitioner wore the regulation Air Force cap.

1. "J.A." denotes the Joint Appendix filed in this Court.

2. The *bona fides* of petitioner's religious beliefs and the fact that it is part of Orthodox Jewish practice for males to wear a head covering at all times were admitted by the government in the district court. Specifically, the Air Force admitted that "[i]t is a well-established religious tradition and practice among adherents to Orthodox Judaism that males keep their heads covered at all times" (J.A. 146).

When indoors, where the wearing of the cap is prohibited by Air Force regulations, he wore a "yarmulke" — a dark-colored skull-cap measuring approximately 5½ inches in diameter (J.A. 206).

During this entire period of more than three-and-one-half years, petitioner received consistently outstanding performance ratings for his military service (J.A. 184, 214-225). No complaints concerning his yarmulke were received. Nor was there any other suggestion that his variance from standard Air Force dress had any harmful effect on his execution of his duties or on anyone else's performance (J.A. 163-167).

In April 1981 petitioner testified as a witness for the defense in a court-martial while wearing his yarmulke. Opposing counsel then made a complaint against him to the hospital commandant (J.A. 15). On May 8, 1981, petitioner was told by the commandant that by wearing a yarmulke while on duty he violated the Air Force Dress Code, AFR 35-10, and that he would no longer be permitted to commit this violation outside the hospital (J.A. 167-168). Less than two months later — after there had been discussion between an attorney representing petitioner and the Office of the Air Force General Counsel — the commandant revised his order to prohibit petitioner from wearing a yarmulke anywhere, including the hospital (J.A. 171-172, 207). On the following day, petitioner was given a formal letter of reprimand and threatened with additional sanctions, including a court-martial, if he did not cease wearing his yarmulke while in uniform (J.A. 208).

Petitioner promptly instituted this action for injunctive relief and damages. The district court entered a temporary restraining order and, after a hearing that was consolidated with a trial on the merits, issued an injunction sustaining petitioner's constitutional right to keep his head covered notwithstanding the Air Force regulation (Pet. App. 35a-36a). Quoting this Court, the district

court observed that military discipline "may render permissible within the military that which would be constitutionally impermissible outside it," but that "deference does not mean abdication" (Pet. App. 32a-33a). Having heard the testimony of expert witnesses and such explanation as the Air Force gave for its refusal to grant an exemption from its dress code for petitioner's religiously motivated wearing of a yarmulke, the district court concluded that no "reasoned and deliberate" analysis supported the Air Force's prohibition (Pet. App. 33a). The district court enjoined the defendants from applying AFR 35-10 to petitioner "insofar as it relates to his wearing a yarmulke for religious reasons," ordered the expungement from petitioner's military records of all negative references relating to his wearing of a yarmulke, and awarded damages for pay lost as a result of the commandant's illegal order (Pet. App. 35a-36a).[3]

The court of appeals reversed. It held that the proper constitutional inquiry was "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree" (Pet. App. 11a). Although the court found various of the Air Force's justifications for barring a yarmulke in a military hospital "unpersuasive" (Pet. App. 16a) or "weak" (Pet. App. 17a), and acknowledged that petitioner's responsive arguments had "some force" (*id.*), the court concluded that "the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible" (Pet. App. 19a). The court held that although the dress regulations are

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3. Petitioner had applied for an extension of his active duty with the Air Force prior to the events of May 1981. Although the commandant initially recommended that his application be granted, he withdrew that recommendation once the issue over petitioner's yarmulke arose (J.A. 21). Petitioner's application was then denied. Another action has been filed for damages resulting from this denial. *Goldman v. Secretary of Defense*, D.D.C. No. 81-3197. That action is awaiting the final outcome of this case.

"necessarily arbitrary," they may be enforced "not for the sake of the regulations themselves, but for the sake of enforcement" (*id.*).

Three Circuit Judges dissented from the denial of a petition for rehearing *en banc*. Circuit Judge Starr said that notwithstanding the deference due the military in matters relating to military affairs, the panel's decision "abdicates the judiciary's limited but important function in the extraordinarily delicate environment of military personnel" (Pet. App. 23a). He characterized the Air Force's treatment of petitioner as "patently unconscionable," noting that neither expert testimony nor common sense justified the conclusion that other servicemen would resent a dress code exception for sincere religious beliefs (Pet. App. 25a-26a). Circuit Judges Ginsburg and Scalia also dissented on the ground that the First Amendment required accommodation to petitioner's religious observance (Pet. App. 27a).

INTRODUCTION AND SUMMARY OF ARGUMENT

According to many respected rabbinical authorities, Jewish law requires observant men to keep their heads covered at all times. The religious obligation may be satisfied by wearing a yarmulke — a skull-cap that is universally recognizable as a form of religious observance. This case concerns the constitutional power of government to forbid an individual from observing this religious duty while he serves as a psychologist at an Air Force hospital.

Wearing a yarmulke is the paradigmatic benign religious observance. The yarmulke's impact on society is singularly inoffensive, nonintrusive and nonburdensome.

(1) Because the religious obligation is totally fulfilled by the wearing of an article of apparel, it is a private religious observance that neither involves nor interferes

with any person other than the wearer.[4]

(2) Wearing a yarmulke creates no risk of any kind to the public health and welfare.

(3) Wearing a yarmulke imposes no economic or other burden on anyone else.

(4) No special procedure, expense or change in an employer's routine is required to accommodate an employee's religious observance in wearing a yarmulke.

(5) The wearing of a yarmulke is recognizable as a *religious* observance and will not be perceived as a mere personal preference.

(6) The wearing of a yarmulke is not a "valuable" or "widely prized" right that non-religionists would demand for personal secular reasons.

The Air Force has denied petitioner the right to wear his yarmulke not because it claims that the yarmulke endangers public health or welfare or jeopardizes anyone's safety or well-being. Respondent's only justification for its prohibition is that the yarmulke is not authorized by the Air Force's Dress and Personal Appearance Code. The Air Force contends that its authority over the dress of military personnel is so total that it may refuse to permit any apparel exceptions whatever even if a requested exception is based on constitutionally protected rights.

We emphasize that it is the Air Force, and not the petitioner, who is claiming an absolute right. We acknowledge the teaching of this Court's decisions regarding the Free Exercise Clause that was initially expressed in *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) — *i.e.*, that while freedom to believe is "absolute,"

4. Copies of photographs of petitioner wearing the yarmulke, identified during his deposition, appear at J.A. 13. We apologize to the Court for the poor quality of the reproduction, but the original photographs — taken with a Polaroid camera — have inexplicably been lost from the official record. The copies do demonstrate, however, that the yarmulke is close-fitting and is barely noticeable on petitioner's head.

freedom to act pursuant to religious convictions "remains subject to regulation for the protection of society." There is simply no "protection of society" involved in the Air Force's prohibition of the yarmulke. Our claim that petitioner had a constitutional right to wear his yarmulke while in service with the Air Force is not based on a broad constitutional declaration of right but rather rests on a careful and particularized appraisal of the personal and nonintrusive nature of the religious observance at issue, the direct and immediate impact on petitioner's religious observance caused by the Air Force's prohibition of a yarmulke, and the total lack of any "overriding governmental interest" that would justify banning a yarmulke.

This case proceeded to a full trial, during which the Air Force had every opportunity to demonstrate that the wearing of a yarmulke threatened military discipline and morale. In fact, the history of petitioner's own tenure in the Air Force, the record of another Orthodox Jew who wore a yarmulke for two years while serving as a pediatrician in the Air Force, and the absence of any specific instances of disruption proved that there is no possibility of harm in permitting a yarmulke to be worn. In addition, the Air Force did not show in the district court that if a religious exemption were available it would be claimed by enough servicemen to have any impact on the military. Nor did the Air Force consider limiting an exemption to servicemen who based their requests only on religious grounds. Instead, it erroneously assumed that if exemptions were granted on religious grounds, they would also have to be granted for non-religious personal reasons. Finally, the district court found, on ample proof, that morale in the Air Force would be *improved* if exemptions from the Dress Code were permitted.

The Solicitor General has recently proposed a novel constitutional doctrine to govern Free Exercise claims, and his doctrine departs radically from the analysis made by this Court in virtually every freedom-of-religion case

that has been heretofore decided. Rather than inquiring whether a compelling state interest outweighs an exemption for religious observers in cases involving governmental interference with religiously motivated conduct, the Solicitor General now urges this Court to look only at the "programmatic interests" behind the governmental regulation. He maintains that individualized exceptions from a facially neutral regulation are not mandated even for religious observance, no matter how slight the governmental burden or how negligible the impact on the governmental objective. This theory conflicts with what this Court has said previously and with the premises underlying the Free Exercise Clause.

We discuss separately the unique needs of the military which, it has been asserted, warrant "enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement" (Pet. App. 19a). We note that this Court has never authorized the total abdication of constitutional judgments to military authorities. The justification articulated by the Air Force — *i.e.*, its desire for absolute uniformity in dress and appearance — is not immune from judicial scrutiny when a constitutional liberty is at stake.

The Air Force's asserted grounds for barring yarmulkes are patently unsound. The possibility that other military personnel will resent minor exemptions from a standard uniform for observances of religious servicemen is analogous to the now discredited World War II justification for racial segregation in the military. And the fear that if yarmulkes are permitted, "the floodgates will open" and countless military personnel will demand other forms of religious exemptions from the Dress Code is neither supported by the record nor based on any real-life human experience. Indeed the symbolic significance of our Nation's military services and the educational role of the military in teaching the young defenders of our country the principles of liberty require acceptance of petitioner's religious observance. As Judge Starr noted in

dissent, it is unacceptable to argue "that the needs of the military warrant vitiating the very liberties which the armed services have valiantly defended in the two centuries of the Nation's history" (Pet. App. 24a).

ARGUMENT

I.

WEARING A YARMULKE IS A RELIGIOUS OBSERVANCE THAT INTERFERES WITH NO ONE ELSE, DOES NOT HARM THE PUBLIC HEALTH OR WELFARE, AND IMPOSES NO BURDEN OF ACCOMMODATION

Judge Starr accurately perceived that wearing a yarmulke "partakes of the religious significance of prayer and is equally unobtrusive" (Pet. App. 24a). In fact, wearing a yarmulke is the paradigmatic benign religious observance. It is a personal act, affecting only one's own body. The wearer of a yarmulke interferes with no other person and casts no burden, economic or otherwise, on anyone else. He presents no risk, by reason of his yarmulke, to the public health and welfare. Nor does he demand that anyone else change his way of doing business or undergo special procedures or expense to accommodate the religious observance. All that the wearer of the yarmulke asks is tolerance and acquiescence in his slightly idiosyncratic apparel. The sole objection that can be made to the yarmulke is that it can be seen. The fact that it is visible apparel, in and of itself, is the reason why the Air Force wants to forbid it.[5]

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5. The Air Force's objection concerns a yarmulke that stays on the wearer's head, not the risks if the yarmulke falls off during vigorous exercise. Compare *Menora v. Illinois High School Association*, 683 F.2d 1030 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983). Nor does this case concern judicial proceedings, where the yarmulke, by reason of its religious identification of the wearer,

These unique aspects of this religious practice distinguish this case from previous decisions of this Court rejecting claims under the Free Exercise Clause. The classic decision of this Court denying a Free Exercise claim was *Reynolds v. United States*, 98 U.S. 145 (1879), in which a law prohibiting polygamy was upheld even though it inhibited the religious practices of a faith that encouraged polygamy. In *Reynolds*, as well as in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and in *Prince v. Massachusetts*, 321 U.S. 158 (1944), this Court upheld the regulation of religiously motivated conduct because the regulated conduct jeopardized the public welfare. Since polygamy (*Reynolds*) and child labor (*Prince*) were contrary to public policy, the government's authority to prohibit such conduct extended even to devout religionists who engaged in it for sacred motives. And since the public welfare warrants stringent measures to prevent the spread of disease, the *Jacobson* decision held that vaccination may be made mandatory notwithstanding conscientious objections.[6] For similar reasons the Court also recently refused to allow religious observance to override the compelling governmental interest in eradicating racial discrimination in education. *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983).

There have, in addition, been cases where the burden of accommodation was deemed too great to warrant a religious exemption. The Court upheld a state Sunday law that inhibited Sabbath-observance by making it

NOTES (*Continued*)

might create unfair bias or prejudice. Compare *La Rocca v. Lane*, 37 N.Y.2d 575, 338 N.E. 2d 606 (1975), *cert. denied*, 424 U.S. 968 (1976).

6. Lower courts have applied these principles to cases involving other religiously motivated acts that violate public policy, such as snake-handling or the use of narcotics. *See, e.g., State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

"more expensive" because it could not be accommodated with a religious exemption. *Braunfeld v. Brown*, 366 U.S. 599, 605, 608-609 (1961). And just last Term the Court even invalidated, under the Establishment Clause, a law protecting Sabbath-observing employees because it gave them "absolute" rights at the expense of "other employees who do not observe a Sabbath." *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985).

Unlike the religious observances involved in *Bob Jones* or in *Thornton*, wearing a yarmulke has absolutely no impact on the rights or conduct of others. It is a personal mark of religious identity and an individualized acknowledgment of a Divine Creator. It is, in this regard, no different from symbolic devotion or prayer. Hence it is at the very heart of the protection afforded by the Free Exercise Clause of the First Amendment.

Yarmulkes are generally understood to be a form of religious observance. They are commonly seen and accepted in today's society wherever Orthodox Jews are found. University campuses — particularly on the East Coast — have substantial numbers of young men who wear yarmulkes. On the streets of New York City, Los Angeles, Chicago, or Miami, yarmulkes are commonplace. They are increasingly visible in centers of commerce, including retail businesses, brokerage houses, and stock exchanges. Attorneys wearing yarmulkes can be found in the state and federal courthouses of New York, and attorneys wearing yarmulkes have been permitted to sit in the Bar Section of this Court and attend oral arguments.

Wearing a yarmulke is a form of silent devotion. It is the functional equivalent of prayer, because it manifests one's belief in a Supreme Being. When he first described the First Amendment's dual provision as "building a wall of separation between church and State," Thomas Jefferson also declared that man "owes account to none other for his faith or his worship, [and] that the legislative powers of government reach actions only, and not

opinions." 8 Works of Thomas Jefferson 113, quoted in *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961). Wearing a yarmulke is as private and nonintrusive as are belief and prayer. Hence there is rarely any justification for government interference with this observance, and it is entitled to the same protection against legislative encroachment as is afforded to prayer or other forms of worship.

II.

THE RECORD IN THIS CASE REFUTES RESPONDENTS' ASSERTIONS THAT PROHIBITION OF A YARMULKE IS NECESSARY TO PRESERVE MILITARY DISCIPLINE OR MORALE

The court below deferred to the Air Force's contention "that precise adherence to its uniform requirements is necessary to maintain teamwork, motivation, discipline, esprit de corps and image, and that making exceptions for any reason would undermine these goals" (Pet. App. 15a). The Air Force's assertion was, however, nothing more than a sweeping *ipse dixit*. It was based on no actual experience or scientific study, and it was, in fact, contradicted by substantial evidence in the record.

A similar broad assertion of an overriding governmental interest in the education of children was invoked by the state in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). This Court's response to the assertion made in *Yoder* is fully appropriate here (406 U.S. at 221):

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exception.

If that approach is taken in this case, and the Air Force's interests are examined in light of the facts established by the record — as was done in *Yoder* (see 406 U.S. at 222-229) — it is clear that the prohibition of petitioner's act of religious devotion was not justified by any legitimate governmental interest.

A. The Record Established That Wearing a Yarmulke in the Military Results in No Diminution of Military Teamwork, Discipline, or Effectiveness.

A full trial was held on the allegations of petitioner's complaint, and the Air Force had ample opportunity to prove, if it could, that if a member of the armed forces wears a yarmulke the effectiveness of the military will be diminished. The record actually proved the contrary.

(1) *Goldman's Own Experience.* — The petitioner testified about his own experiences during the 44 months that he wore a yarmulke undisturbed while serving as a psychologist at March Air Force Base (J.A. 158, 161-167, 185-186). During that time, no one objected to his wearing a yarmulke and, other than a few inquiries by interested co-workers or patients (J.A. 166-167), it caused little comment. During his entire period of service, his written performance ratings were all "well above standard" or "above standard" (J.A. 184, 214-225). Indeed, his ratings on "Professional Qualities (Attitude, dress, cooperation, bearing)" were "well above standard" in all five reports covering his period of service. One report even stated, "He maintains appropriate military dress and bearing . . . ." (J.A. 217).

If petitioner's yarmulke had, during this extended period, caused the slightest disruption of military discipline or morale, one would surely have expected some mention of the fact in at least one of the five reports. Instead, the reports can only be described as glowing. The last of the ratings, dated October 20, 1980, described him as "an essential member of the professional staff,"

lauded his "expertise, enthusiasm and productivity," and praised his "initiative and leadership . . . and the high professional and military standards he has achieved" (J.A. 224). The Lieutenant Colonel who was his supervisor concluded, "Promotion is strongly supported without reservation" (J.A. 224). The supervisor's superior called petitioner's work "vital" and "essential," and praised his "valuable suggestions" and his supervision of "technicians." He also concluded, "Promotion to Major is strongly recommended" (J.A. 224).

The record amply supported the district court's Finding of Fact 14 (Pet. App. 32a):

> During his service at March Air Force Base, Goldman's wearing of a yarmulke while in military uniform did not adversely affect the performance of his assigned duties nor the operations at the Base Regional Hospital and did not result in complaints from other personnel. Goldman's performance evaluations were consistently at the higher levels. His application for the renewal of his Air Force contract was endorsed with a commendation for his work in the Mental Health Clinic.

(2) *The Experience of Others.* — One of petitioner's witnesses was an Orthodox Jewish pediatrician who had served at Pease Air Force Base from 1974 to 1976 (J.A. 105). The hospital administrator initially advised him that he could not wear a yarmulke, but a waiver request was then submitted and granted (J.A. 106-116). The pediatrician testified that during his two years in the Air Force he wore his yarmulke everywhere, including the hospital and the nursing center. He received occasional questions from children, who had never seen a yarmulke before (J.A. 117). His testimony concluded with the following questions (J.A. 117-118):

> Q. Did any of the enlisted men on base question you about wearing the yarmulke?

A. No.

Q. Did you receive any indication that the yarmulke in any way interfered with your ability to perform your duties as a pediatrician?

A. No.

Q. Once you were permitted to wear your yarmulke for that period of time, did you have any indication that any kind of discipline problems developed at Pease Air Force Base as a result of your wearing the yarmulke?

A. No.

(3) *The Absence of Disruption.* — Another highly probative point is the Air Force's failure to cite a single instance in which the wearing of a yarmulke, or any other religiously motivated exception to the Dress Code, resulted in a disruption of morale. The Air Force acknowledged, in response to petitioner's interrogatories, that no study had ever been done or empirical data gathered to establish any relationship between strict enforcement of a dress code and military discipline or effectiveness (J.A. 27). In addition, the Air Force's expert witness, Major General William R. Usher, conceded that he knew of no incident involving any disruption of morale in the Army after Sikhs were permitted to wear beards (J.A. 55), or in the Air Force after district courts ordered the Air Force to permit Jewish chaplains to wear beards (J.A. 65-67). The chaplain who testified on behalf of the Air Force was asked whether it interfered with military discipline if enlisted men are told to respect the religious attire of their fellow servicemen. He replied (J.A. 99):

I do not have information to answer that one honestly. I am not sure.

> I have not — I have not run into an occasion personally where there was an interference of any kind.

There is, in fact, a gaping hole in the record. There is not a scintilla of proof that religious exemptions from the Dress Code impair military discipline, effectiveness or morale. The Air Force seeks to capitalize on that void, asserting that courts are bound by the military service's bare declaration that religious exemptions will jeopardize military effectiveness. We submit that the burden of proof lies with the Air Force. If it wishes to limit the exercise of a seemingly innocuous religious observance, it must prove — or at least offer some evidence — that the practice gives rise to a threatened danger.

This Court plainly cast the burden on the government agency seeking to restrict religious liberty in its landmark decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). In that case, the Court said (374 U.S. at 406):

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U.S. 516, 530.

There is, on this record, no proof of any "grave abuse endangering paramount interests." There is, instead, convincing proof that wearing a yarmulke has never interfered and will not interfere at all with the military's mission.

B. The Air Force Failed to Demonstrate That a Religious Exemption to the Dress Code Will Be Claimed By Many Military Personnel.

In *United States v. Lee*, 455 U.S. 252 (1982), this Court rejected a Free Exercise claim because it concluded that "it would be difficult to accommodate the

comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." 455 U.S. at 259-260. It was clear to the Court, simply as a matter of human experience, that if individuals could be exempted from paying taxes by invoking religious beliefs, the country's entire tax system would collapse. The same cannot, however, be said of the claim made here. There is nothing intrinsically desirable about wearing a skullcap or any other religiously mandated apparel. Hence there is no reason to presume that if an exemption from the Dress Code is permitted for religious apparel, it would be invoked by many servicemen.

In fact, the record made in the district court proved the contrary. Major General Usher — the Director of Personnel Plans at Air Force Headquarters in Washington — was asked whether he had ever been personally involved in any case other than petitioner's in which a serviceman sought an exemption from the Dress Code for religious reasons. He replied in the negative (J.A. 53). He was then asked to describe "the most extreme case you have heard of," and he cited a request by practicing Sikhs to wear beards and turbans. The Air Force's Director of Personnel Plans was then asked (J.A. 54):

> Q. Have you ever heard of any members of the Sikh religion, to your knowledge, in the Air Force?
>
> A. Not to my knowledge.

When he was asked to estimate "the maximum number of people in the Air Force . . . who have some religious belief that would affect the clothing that they wear in violation of Air Force dress code," General Usher replied that it was "an unknown unknown" (J.A. 59). Chaplain Reeves, who had drawn up a chart of minority religious denominations in the United States, including those who have special dress requirements, acknowledged that he did not know whether there were, in the Air Force or in any military branch, any members of the

sects that had special dress requirements (J.A. 92-93, 95-96). With regard to the Sikhs, Chaplain Reeves testified that he knew of no dress exception request from any Sikh member of the Air Force (J.A. 95). His testimony on this point was encapsulated in the following question and answer (J.A. 96):

> Q. In fact, going through the rest of your study, leaving out for the time being the Jewish groups and the one member of the Sikhs whom you have described, do you know of anyone in the Air Force who is a member of any or adherent to any religious faith that requires some exception or variation from the Air Force dress code, according to your statement?
>
> A. Not that I can think of, no, sir.

Additional proof that the Air Force need not fear a deluge of exemption requests comes from the absence of requests in its files. In Interrogatory 9(a), the Air Force was asked to name the individuals who had requested exemptions from the Dress Code, and no such requests based on religion were found and produced (J.A. 23-24).

The inescapable inference from the evidentiary record is that religious exemptions from the Air Force's Dress Code are only a theoretical problem. If the Air Force were to permit those who have sincere conscientious scruples to wear an article of apparel that deviates from the Dress Code, these instances would be few and far between. And they would have no impact whatever on the discipline, effectiveness and morale of the Air Force.

C. The Record Established That the Air Force Has Not Considered Limiting Exceptions to the Dress Code to Servicemen Who Claim a Religious Basis for Their Distinctive Apparel.

General Usher's contention during his testimony was that the Air Force had to prohibit petitioner's

yarmulke because "it is a matter of where you draw the line" (J.A. 41). He explained that, in his view, any deviation involves "personal standards and tastes" (*id.*), and it would be impossible to distinguish between religious standards and those that are purely personal.

The Air Force's refusal to treat religious claims differently from purely secular ones was made more explicit during General Usher's cross-examination, when he said (J.A. 49):

> . . . I say that our position is that we do not make any exception on religious grounds. Of course, we do not distinguish between religious and other grounds.
>
> Q. You do not distinguish between religious and non-religious grounds?
>
> A. That is correct.

Subsequently, General Usher testified (J.A. 55):

> Q. Well, you would agree, would you not, that personal tastes not based on religion can be distinguished from religious obligations or religious compulsions of some kind that someone feels?
>
> A. No, I do not.
>
> Q. You do not believe so?
>
> A. No.

The district court found as a fact that "the Air Force does not distinguish between personnel deviating from uniform dress for religious reasons and those deviating from uniform dress for other reasons such as personal taste or preference" (Pet. App. 31a). The refusal to make that distinction plainly infringes upon a constitutionally protected liberty. A government agency may not refuse to recognize a religiously based exception on the ground that it is indistinguishable from an exception based entirely on personal taste or preference. Indeed, if such

equivalent treatment of religious and non-religious claims were permissible, this Court's decisions upholding Free Exercise claims could not have been decided as they were. Could the State of Wisconsin have denied the Amish claim for religious exemption in the *Yoder* case on the ground that it refused to draw any line between religious and non-religious requests to be exempt from high school attendance? This Court would not have decided, as it did in *Wisconsin v. Yoder*, 406 U.S. 205, 235-236 (1972), that the Amish had made a "convincing showing, one that probably few other religious groups or sects could make," if a government agency could unilaterally refuse to distinguish between religious and non-religious claims.

By the same token, *Sherbert v. Verner*, 374 U.S. 398 (1963); *In re Jenison*, 375 U.S. 14 (1963); and *Thomas v. Review Board*, 450 U.S. 707 (1981), could not have been decided as they were if a state could simply refuse to acknowledge a difference between religious and secular claims. Had the State of South Carolina been heard to argue in *Sherbert*, as the Air Force does here, that it could not grant religious exemptions without granting similar non-religious requests, the effect on the state's unemployment compensation system would have been disastrous. The same would have been true of compulsory jury service involved in the *Jenison* case.

The correct constitutional rule is that a government agency confronted with a request for a *religious* exemption must consider whether the granting of *religious* exemptions would defeat or significantly interfere with the regulatory goal. It is constitutionally impermissible to deny a requested religious exemption on the ground that too heavy a burden would be placed on the regulatory scheme if non-religious exemptions were also permitted.

D. The Record Established That Religious Exemptions Are Desirable.

Under *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981), it was the Air Force's burden to demonstrate that it had "interests of the highest order" to overbalance petitioner's religious observance. For reasons previously stated, it is clear that the record does not sustain such a showing by the Air Force. We submit, in addition, that the record goes beyond the Air Force's failure to sustain its burden. The evidence proved the contrary, and the district court — whose duty it was to weigh any conflicting opinions — credited testimony that said that granting religious exemptions would affirmatively benefit the military.

The district court's Finding of Fact 12 reads as follows (Pet. App. 31a):

> Exceptions for legitimate reasons from the requirements of AFR 35-10 may enhance the effectiveness of the Air Force by dissipating hostility over minor matters and thus contribute to a perception of the Air Force as a less rigid, more humane institution. Occasional exceptions to the requirements of AFR 35-10 for specific legitimate purposes will not adversely affect the ability of the Air Force to carry out its mission.

The district court's conclusion was based on *military* testimony given by the Air Force's own Chief Clinical Psychologist. Petitioner's witness was Dr. Samuel Levinson, who had served as Chief Clinical Psychologist to the Air Force between 1971 and 1977 (J.A. 119). He acknowledged that it was beneficial for the Air Force to require the wearing of a uniform but testified, on the basis of 26 years in the Air Force, that there are many informal exceptions to the Dress Code (J.A. 125-127), and that such exemptions actually improve morale in the military service (J.A. 127-128). Dr. Levinson testified (J.A. 129-131):

Q. All right. Would the fact that a particular variation from the dress code based on religion affect other personnel's view of that variation in any way?

A. No, I think what they would do is treat it with respect and get a sense of the system is somewhat flexible and that the system does respect — does respect religion.

* * *

Q. And with regard to religious variations, is it your view as a psychologist that the same would be true if exemptions were permitted for religious variations . . .

A. Yes.

Q. . . . from the dress code?

A. Yes.

Q. Would that in any way have any educational impact on Air Force personnel as well as with regard to our pluralistic society?

A. Yes. I think it would teach people that there is room for differences, differences that are not flaunted in a negative or power-struggle kind of way, differences that have little or nothing to do with the mission at hand, you know.

Dr. Levinson also testified that in his expert opinion, the wearing of a yarmulke by an Air Force psychologist presented no serious problem for discipline, teamwork, motivation, esprit de corps, or image to the military (J.A. 133-136). His testimony, together with the acknowledgement of the Air Force's witnesses that it is desirable to teach servicemen that diverse religious communities exist within the country (J.A. 58, 97-98), establish the affirmative benefits of granting religious exemptions from the Dress Code.

III.

THE BURDEN IMPOSED BY GOVERNMENTAL ACCOMMODATION TO A PARTICULAR RELIGIOUS OBSERVANCE, NOT THE GOVERNMENT'S "PROGRAMMATIC INTEREST" IN A GENERALLY APPLICABLE REGULATION, IS THE RELEVANT CONSTITUTIONAL STANDARD

In his *amicus* brief last Term in *Jensen v. Quaring*, No. 83-1944, affirmed by an equally divided court, 105 S.Ct. 3492 (1985), and again in his brief in the companion to this case, *Heckler v. Roy*, No. 84-780, the Solicitor General makes a novel and pernicious constitutional argument that would eradicate much of the constitutional protection that the Free Exercise Clause has heretofore afforded to constitutional minorities. He contends that the Constitution never confers upon a religious observer an individualized exemption from a general, facially neutral governmental regulation. Under the Solicitor General's argument, the Free Exercise Clause requires only that government implement its "programmatic interests" by the least burdensome alternative "applicable to the populace as a whole" (Brief for the Appellants, No. 84-780, p. 29). The ease with which a particular religious observance may be excepted from a general regulation or may be otherwise accommodated is, under this view, irrelevant. The sole focus of a reviewing court must be on the government's "programmatic interests" and on whether they have been implemented by the "least restrictive means" vis-a-vis *everyone* who is affected. The consequence of this argument is that even if an exemption for a religious observance would not have the slightest effect on the objectives of a regulatory program, the observance could be prohibited under a facially neutral regulation.

The Solicitor General's argument is contrary to the premises that underlie all of this Court's decisions under the Free Exercise Clause. In a number of cases the Court

has, to be sure, rejected Free Exercise claims because, as articulated in the parameter-setting language of *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940), a restriction upon the religious observance was necessary "for the protection of society." But in no reported case has this Court approved the approach now urged by the Solicitor General.

A. This Court's Decisions Sustaining Constitutional Claims Under the Free Exercise Clause Rest on an Appraisal of the Effect of Individualized Exemptions.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court upheld the Free Exercise claim of a Seventh-day Adventist who was denied unemployment compensation because she refused to take jobs that would have required her to work on her Sabbath. In considering whether the state had a "compelling state interest" that justified the denial of the religionist's request for compensation, this Court did *not* look to the "programmatic interests" of the government; it rather considered whether the denial of an exemption for religious observers was justified by a "compelling state interest."

The Court's relevant discussion, appearing at 374 U.S. 406-409, considers only the question whether an insurmountable "abuse or danger" would be presented by exempting workers who assert conscientious objection to Saturday work. The Court found that the "possibility" of "fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work" was not established by the record, and it was "highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties." 374 U.S. at 407. Indeed, in considering the possibility of "alternative forms of regulation," the Court explicitly cited the rulings of state courts and many local administrative agencies that had exempted individuals

who asserted "conscientious objections to work on the Sabbath." 374 U.S. at 407-408, n. 7.[7]

Had this Court in *Sherbert* followed the Solicitor General's proposed analysis, the effect of an exemption for religious observers would have been irrelevant. The only question would have been the weight of the "programmatic interests" of denying unemployment compensation to those who voluntarily rejected job offers. Plainly, a state has significant interests in denying benefits in such cases, and the minimal effect of exempting conscientious objectors would, under the Solicitor General's theory, have been entirely beside the point.

This Court followed the same approach — weighing the likely consequences of exempting religious observers — in *Thomas v. Review Board,* 450 U.S. 707 (1981). After concluding that denial of unemployment compensation was an infringement on the free exercise of religion, the Court held that such an "inroad on religious liberty" could only be justified if it were "the least restrictive means of achieving some compelling state interest." 450 U.S. at 718. The Court did *not* then analyze the "compelling state interest" in light of any across-the-board "programmatic interests." Instead it did precisely what the Solicitor General asserts should not be done in Free Exercise cases — it examined whether the governmental interest would be seriously impaired by granting the requested religious exemption, considering explicitly how numerous the requested exemptions would be (450 U.S. at 719; emphasis added):

> There is no evidence in the record to indicate that *the number of people* who find themselves in the

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7. The Court even distinguished *Braunfeld v. Brown,* 366 U.S. 599 (1961), on the ground that "[r]equiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable." 374 U.S. at 408-409.

> predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment," or even to seriously affect unemployment — and no such claim was advanced by the Review Board. Similarly, although detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position. Nor is there any reason to believe that *the number of people* terminating employment for religious reasons will be so great as to motivate employers to make such inquiries.

The Solicitor General asserts that *Sherbert* and *Thomas* were decided as they were simply because there was in each case no demonstration of a compelling governmental interest (Brief for the Appellants, No. 84-780, p. 38), without specifying — as the opinions themselves do — the nature of the private interest that the compelling governmental interest would have had to outweigh. In fact, the Court's opinions in both cases reveal that the Court determined there was no compelling governmental interest in *denying a religious exemption from the general rule*, thereby proving that it is the impact of an exemption, not the importance of the government's "programmatic interests," that must be the focus of a reviewing court's attention.[8]

Moreover, the Court's reasoning in *Sherbert v. Verner* is demonstrated by its almost contemporaneous summary ruling in In *re Jenison*, 375 U.S. 14 (1963).

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8. The Solicitor General creates a *post hoc* rationalization for *Sherbert* and *Thomas* when he asserts that it was relevant in those cases that the particular unemployment compensation laws used the words "good cause." Brief for the Appellants, No. 84-780, p. 38 n.16. Nothing in either opinion suggests that those words were critical or even relevant.

Sherbert was decided on June 17, 1963. On the first decision day of the Term beginning October 1963, the Court summarily reversed a contempt-of-court conviction of a woman who had refused to serve on a petit jury because such service violated her religious convictions. *In re Jenison Contempt Proceedings*, 265 Minn. 96, 120 N.W.2d 515 (1963). This Court's *per curiam* order directed "further consideration in light of *Sherbert v. Verner*, 374 U.S. 398." See 375 U.S. 14. The various rationalizations now provided by the Solicitor General for the decisions in *Sherbert* and *Thomas* plainly did not apply to the question whether an individual prospective juror was entitled to be excused from service, under the Free Exercise Clause, if her potential service violated her conscientious conviction.

The Minnesota Supreme Court understood *Jenison* to require an examination of whether excusing religiously observant jurors would disable or seriously harm the jury selection system. On remand, the Minnesota court said (*In re Mrs. Owen Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963); emphasis added):

> Upon reconsideration we have come to the conclusion there has been an inadequate showing that the state's interest in obtaining competent jurors requires us to override relator's right to the free exercise of her religion. Consequently we hold that *until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any persons whose religious convictions prohibit compulsory jury duty shall henceforth be exempt*.[9]

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9. Since the result in *Jenison* was a complete exemption from jury service for the conscientious objector, it disproves the Solicitor General's assertion that *Sherbert* and *Thomas* were merely cases that prevented "discriminat[ion] against the exercise of religious beliefs" rather than granting "favored treatment for members of the

More compelling refutation of the Solicitor General's theory than *Sherbert*, *Thomas* and *Jenison*, however, is provided by the Court's opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Solicitor General apparently recognizes that he cannot explain the result in *Yoder* under his novel constitutional theory, and he dismisses it briefly as "sui generis," asserting that it involved a clash between the interests of society and the interests of parents in raising their children. Brief for the Appellants, No. 84-780, p. 41.

Notwithstanding the quotations from the *Yoder* opinion that the Solicitor General plucks out of context, *Yoder* did not turn on the doctrine of "parental primacy." Only in evaluating the state's claim that its opinion of what was best for children could, under the doctrine of *parens patriae*, replace the considered judgments of parents did this Court invoke the "traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions." 406 U.S. at 231. Earlier in its opinion the Court considered the basic Free Exercise claim made by the Amish, who asserted that they were constitutionally entitled to exemption from the law's compulsory education requirement beyond the eighth grade. The Court's statement of the issue, as well as its conclusion, demonstrate that the critical constitutional question was whether an individualized exemption was mandatory, not whether the state's "programmatic interests" were compelling (406 U.S. at 221, 235-236; emphasis added):

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the

NOTES *(Continued)*

religious sect." Brief for the Appellants, No. 84-780, p. 40. In this regard, *Jenison* is like *Yoder*, which recognized that, in appropriate circumstances, the Constitution compels the granting of a religiously based exemption.

> interests that the State seeks to promote by its requirement for compulsory education to age 16, *and the impediment to those objectives that would flow from recognizing the claimed Amish exception.*
>
> * * *
>
> In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, *it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.*

By the same token, in this case and others in which a religious observer seeks an exemption from a law or regulation of general applicability, it is incumbent on the government agency to demonstrate how its interest "would be adversely affected by granting an exemption" based upon religious or conscientious scruples.[10]

B. This Court's Decisions Rejecting Constitutional Claims Under the Free Exercise Clause Do Not Support the Solicitor General's Novel Constitutional Theory.

We turn now to the other side of the constitutional coin — the decisions of this Court that have denied Free Exercise claims. If the Solicitor General's constitutional theory were correct, those decisions should merely have weighed the "programmatic interests" behind facially neutral legislation or regulation without considering whether exemptions for conscientious objectors would

10. Professor Tribe has cautioned, "[I]t is crucial to avoid the error of equating the state's interest in denying a religious exemption with the state's usually much greater interest in maintaining the underlying rule or program for unexceptional cases." L. Tribe, American Constitutional Law 855 (1978).

have substantially undermined or inhibited the governmental objectives. In fact, the decisions did not follow this course.

Braunfeld v. Brown, 366 U.S. 599 (1961), is illustrative. The question in *Braunfeld* was whether Sabbath-observing shopkeepers were constitutionally entitled to be exempt from Sunday-closing laws. This Court held first that religiously based conduct is subject to legislative power if the conduct is "found to be in violation of important social duties or subversive of good order . . . ." 366 U.S. at 603. The Court then observed that the effect of the Sunday Laws on the Sabbatarian shopkeepers was not to prohibit their religious practices but only to make those practices "more expensive." 366 U.S. at 605-606. This was held to be "an indirect burden on the exercise of religion." 366 U.S. at 606.

The Court then considered the purposes behind the Sunday Laws and concluded that these objectives — which the Solicitor General would presumably characterize today as "programmatic governmental interests" — were significant and permissible. 366 U.S. at 607-608. Under the Solicitor General's novel constitutional theory, the opinion should have ended at that point.

The Court went on, however, to discuss the core of the shopkeepers' Free Exercise claim (366 U.S. at 608):

> They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday.

The Court did *not* say in *Braunfeld*, as the Solicitor General now argues, that "it is not relevant that granting exemptions in rare cases might work only a minute or incremental interference with the governmental interest." Brief for the Appellants, No. 84-780, p. 34. Instead, the Court closely analyzed the consequences of permitting exceptions, examining whether they would,

in fact, be only minute or incremental interferences. The Court then and held (366 U.S. at 608)

> reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity.

The Court enumerated the problems that would arise if religious exemptions were permitted: Enforcement would be more difficult because two or more days would have to be policed, Sabbatarians might obtain economic advantages over their competitors because of their exemptions, and this might be an inducement for spurious claims of religious conviction that could require "a state-conducted inquiry into the sincerity of the individual's religious beliefs." 366 U.S. at 608-609. Finally, the Court noted, exemptions for Sabbatarians might result in religiously discriminatory hiring. 366 U.S. at 609.

It is clear that the Court in *Braunfeld* believed that the constitutional issue was whether a religiously based exemption was mandatory. It rejected the constitutional claim because, in its view, such an exemption would have overcome the fundamental legislative objective — to provide a general day of rest for the community. Had the exemption not had this effect — *i.e.*, had its impact on the regulation been "minute or incremental" — it is obvious that the Court would have upheld the constitutional right.

A similar approach was followed in cases such as *Reynolds v. United States*, 98 U.S. 145 (1879), and *Prince v. Massachusetts*, 321 U.S. 158 (1944). As the Court observed in *Braunfeld*, those cases involved "religious practices [that] themselves conflicted with the public interest." 366 U.S. at 605. Obviously, granting an exemption for an act that violates "important social duties or [is] subversive of good order" (366 U.S. at 603) is different from recognizing a religious exemption for an

act that is inherently innocuous and inoffensive but conflicts with some neutral regulation or standard of conduct imposed by the state for an extrinsic governmental purpose.

The Solicitor General also invokes two relatively recent cases as support for his theory. *United States v. Lee*, 455 U.S. 252 (1982), and *Bob Jones University v. United States*, 461 U.S. 574 (1983). Brief for the Appellants, No. 84-780, pp. 27-32. Neither decision, however, proves his point, and both tend to contradict it.

In *United States v. Lee*, 455 U.S. 252, 259-260 (1982), a claim that there should be a religious exemption from the duty to pay Social Security taxes was denied, but not because of the compelling "programmatic interests" in collecting such taxes. Rather, the Court considered the consequences that would flow if individualized religious exemptions were permitted. The Court held that rather than being limited to a manageable handful of conscientious objectors, a religiously based exemption would overwhelm the entire system of tax collection (455 U.S. at 260; citations omitted):

> The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

The Court also determined in the *Bob Jones* case that the compelling governmental interest "in eradicating racial discrimination in education" (461 U.S. at 604) precluded an exemption for conduct that would have conflicted squarely with that interest. *Bob Jones*, like *Reynolds* and *Prince*, involved religiously motivated conduct that collided head-on with a paramount governmental objective. As this Court noted (461 U.S. at 604; citations omitted):

The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and no "less restrictive means" are available to achieve the governmental interest.

Bob Jones is distinguishable, therefore, from cases like this one, where an exemption for conscientious believers would not legalize conduct that is condemned by the legislature or by government regulation. In this case, the relevant constitutional question is whether an exemption based on religious practice would frustrate the realization of an overriding governmental interest.

C. The Policies of the Free Exercise Clause Require a Court to Appraise the Effect of Individualized Exemptions.

Finally, we turn to the fundamental policies of the Free Exercise Clause, which are inconsistent with the constitutional doctrine that the Solicitor General now expounds. The Solicitor General views it as "absurd" and as "defy[ing] common sense" to require government to accommodate "individuals holding the most unique and idiosyncratic religious beliefs" while possibly denying such accommodation to "religious beliefs so widely held that the administrative burden and programmatic impact would be deemed too great." Brief for the Appellants, No. 84-780, p. 35. This assertion ignores the purpose of the Free Exercise Clause — to guarantee religious toleration and protect small religious minorities.

The language of the Free Exercise Clause was derived from Maryland's 1649 Act Concerning Religion (commonly known as the "Toleration Act"). See Schwartz, The Bill of Rights: A Documentary History 90-94, 232, 1121 (1971). The Toleration Act broadly protected an individual from being "any ways troubled, molested or discountenanced for or in respect of his or her

religion nor in the free exercise thereof . . ."[11] Plainly, the 1649 law was protecting the belief and practice of small denominations, whose members were not to be impeded in any manner on account of their religious beliefs or practices. To read the Free Exercise protection, as the Solicitor General now reads it, as intended to secure greater rights for religions with large memberships than for those who have few adherents is to turn the Free Exercise Clause on its head. It is not anomalous to require governmental accommodations when the beneficiaries of those accommodations are so few that they are politically weak and their exemption has negligible effects on a government program. Striking that balance is precisely what religious toleration is all about. James Madison — the guiding hand behind the First Amendment — observed that freedom of religion

> arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.

Schwartz, The Bill of Rights: A Documentary History 796 (1971).

In considering the effects of a religious exemption it is, of course, proper to evaluate how many others similarly situated will be able to claim the same exemption. If the exemption may be claimed by so many others that the compelling governmental policy will be frustrated, it might be permissible to deny the exemption. That was the situation in *United States v. Lee*, 455 U.S. 252 (1982), where the Court concluded that the identical claim of religious exemption could be made by so many taxpayers that the tax-collection system would be destroyed.

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11. Professor Schwartz notes, "Although the Toleration Act was limited in its protection to Christians, there was not, so far as we know, any persecution of Jews or others in the colony." *Id.* at 91.

The constitutional standard we advocate is not inconsistent in any way with the statements quoted by the Solicitor General from decisions such as *Regan v. Time, Inc.*, 104 S.Ct. 3262, 3272 n.12 (1984); *Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065, 3070-3071 (1984); and *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981). See Brief for the Appellants, No. 84-780, p. 36. In each of those cases, the Court observed that the full potential effect of a First Amendment exemption must be considered in determining whether the exemption is constitutionally mandatory; it is inadequate to consider only the effects of exempting the individual plaintiff.

By a parity of reasoning, we do not argue that in this case the Court is limited to considering whether military discipline or esprit de corps would be impaired if Captain Goldman alone were permitted to wear a yarmulke. A court must consider the effect of permitting yarmulkes to be worn by all Orthodox Jewish military personnel. Moreover, as the district court found, "[o]nce an exception is made for male members of the Jewish faith to wear yarmulkes, members of the other faiths who wish to wear skull caps must be permitted to do so" (Pet. App. 33a).

A court might even go beyond skullcaps and consider the effects of other small, religiously mandated deviations from the standard military uniform. That was, in fact, the focus of petitioner's attention during the trial of this case in the district court. The Air Force's expert witnesses were unable, however, to specify any actual servicemen, other than Orthodox Jewish personnel and an unidentified Sikh, who were members of religious faiths that required exceptions from the Air Force's Dress Code (J.A. 59, 96). Hence there is no evidence in this record that the burden of exempting or accommodating to religiously mandated deviations from the Dress Code have

a serious adverse impact on the Air Force. In such circumstances, the Free Exercise Clause mandates that religious liberty prevail.

IV.

THE MILITARY SERVICES DO NOT HAVE CARTE BLANCHE IN DEALING WITH MILITARY PERSONNEL'S CONSTITUTIONAL LIBERTIES

The Solicitor General appears to acknowledge that it would be constitutionally impermissible to prohibit yarmulkes in a civilian context. His Brief in Opposition in this case states (Br. in Opp., pp. 10-11; citations omitted):

> A uniform dress regulation of this sort would presumably not survive constitutional scrutiny outside the military, police, or analogous contexts, and would be subject to challenge in the private sector under Title VII of the Civil Rights Act of 1964. In the military, however, the right to select one's manner of dress, like the right to circulate petitions or to engage in disruptive expression, is circumscribed by the legitimate requirements of military discipline and order.

We have demonstrated in the preceding pages of this brief that wearing a yarmulke is a singularly innocuous and inoffensive religious observance and that the record wholly fails to support any assertion that military discipline or morale would be affected if yarmulkes are authorized to be worn by servicemen who feel conscientiously compelled to wear them. In fact, the record supports the district court's conclusion that the Air Force would *improve* discipline and morale if it allowed a religious exemption from its Dress Code.

The remaining question, however, is whether the military services are so far beyond the reach of ordinary

constitutional adjudication that no matter how insubstantial their showing in a judicial forum and no matter how remote the possibility of any real harm to the effectiveness of the military service, the Air Force's declaration of the need for absolute uniformity must be the very last word. That was, essentially, the conclusion of the court of appeals, which found no substance to any of the justifications cited by the Air Force but nonetheless deferred to the military's ultimate conclusion (Pet. App. 19a-20a).

A. Military Personnel Have Constitutional Rights.

In *Chappell v. Wallace*, 462 U.S. 296 (1983), this Court held that the unique structure of the Military Establishment barred damage lawsuits by enlisted military personnel alleging that their superiors had violated their constitutional rights. Nonetheless, the Court was careful to conclude its unanimous opinion with the following observation (462 U.S. at 304; citation omitted):

> Chief Justice Warren had occasion to note that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

This case effectively tests that proposition. Petitioner initiated this action to be permitted to engage in the free exercise of his religious observance. If a district court is obliged to dismiss a Free Exercise of Religion claim brought against a military service simply because the service asserts — with no evidentiary support — that it is entitled to prohibit the religious observance "for the sake of enforcement," servicemen have, in fact, been "stripped of basic rights simply because they have doffed their civilian clothes." This specific case may relate only

to a small patch of cloth worn on a serviceman's head, but if the Air Force position is sustained, its importance far exceeds that modest religious observance. Under the standard of the court below, even the most fundamental religious observance, including worship itself, may be prohibited in the military simply to teach uniformity and discipline.

We recognize the legal principle articulated by this Court in *Parker v. Levy*, 417 U.S. 733, 758 (1974), that "the different character of the military community and of the military mission requires a different application" of the First Amendment than in civilian cases. It is, of course, true that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.* But this Court began that very passage in *Parker v. Levy* with the observation that "members of the military are not excluded from the protection granted by the First Amendment." *Id.* There must, therefore, be both procedural and substantive avenues for asserting First Amendment claims against overly expansive military regulations.

This same constitutional principle — that First Amendment rights exist in the military but that the government's interests should be given greater weight in the military context — was articulated in *Brown v. Glines*, 444 U.S. 348, 354 (1980). The Court again said that "members of the military services are entitled to the protections of the First Amendment," while ruling that "[s]peech likely to interfere with . . . vital prerequisites for military effectiveness . . . can be excluded from a military base." The Court did *not* say, in either *Levy or Glines*, that any speech that the military service wishes to exclude, merely "for the sake of enforcement," may be excluded. Even under the *Glines* standard, the military must make some showing that the particular excluded speech is "likely to interfere with . . . vital prerequisites

for military effectiveness." In this case, as we have previously demonstrated, there is no showing whatever that the wearing of a yarmulke would interfere in any way with the discipline, morale or effectiveness of the Air Force.

B. Misunderstanding or Resentment By Other Servicemen Is Not a Justification for Denying Petitioner's Constitutional Rights.

General Usher testified that religious exemptions should not be granted in the military because servicemen who do not have a religious claim for exemption will resent the fact that the religionist is permitted to deviate from the Dress Code. He testified (J.A. 63):

> The point that I am making is that if you allow this example to stand up, you then begin to have to allow other examples.
>
> Or, you get into the situation where people point out to you, "There is somebody violating the regulation. Why do I have to adhere to that regulation or to another regulation?"

See also J.A. 41, 52.

The fact that others may misunderstand or resent an individual's exercise of his religious rights is not, however, reason to deny the right. It is well established that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963). *See also Palmore v. Sidoti*, 104 S.Ct. 1879, 1882 (1984); *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249 (1985).

The military's involvement in this matter does not legitimize private resentment of the exercise of First Amendment rights. Nor does invocation of terms such as "discipline and morale" change the underlying nature of the Air Force's asserted interest. When General George C. Marshall was asked to create an all-volunteer, racially

integrated unit in the army, he responded in a memorandum to Secretary Stimson (December 1, 1941) that racial segregation was "a social problem which has perplexed the American people throughout the history of this nation. The Army cannot accomplish such a solution and should not be charged with such an undertaking. The settlement of vexing racial problems cannot be permitted to complicate the tremendous task of the War Department and thereby jeopardize the discipline and morale." *See* Lee, *The Employment of Negro Troops in World War II* (Washington, D.C.: Office of the Chief of Military History, United States Army, 1966). The Air Force is making substantially the same argument when it asserts that petitioner's wearing of a yarmulke will not be understood by other servicemen and will thereby undermine morale and discipline.

The Air Force took the position in district court that if a court ordered it to accommodate to religious claims — as it had done in the cases of Jewish chaplains who asserted the right to wear beards in the Air Force — the resentment of fellow servicemen would be diminished. General Usher explained that it would be a "ready explanation that we ended up in court on their matters" (J.A. 68). This stance — that the military could more readily be ordered by a court to comply with a constitutional claim to the free exercise of religion than it could accommodate to that claim on its own — overlooks the Air Force's separate obligation to enforce the Constitution. If the First Amendment entitles petitioner to wear his yarmulke, the Air Force may not, simply to win the temporary good-will of its enlisted personnel, refuse to recognize that right and force petitioner to vindicate it in a judicial forum.

C. If Air Force Regulations Authorized a Religious Exemption, the Risk to Discipline and Morale Would be Eliminated.

The most puzzling aspect of the Air Force's adamant position in this case is that its discipline and morale argument is ultimately circular. It is important "for the sake of enforcement" to prohibit the wearing of a yarmulke only so long as the applicable regulation forbids a yarmulke to be worn. If, however, the regulations authorized religious exemptions, the wearing of a yarmulke would come within such an exemption and would not, therefore, be viewed as an unauthorized deviation from the regulations.

General Usher candidly answered questions directed to that point (J.A. 52):

> Q. I understand you to testify, General Usher, that the key reason why an exception or a departure from AFR 35-10 would affect the Air Force, is that other people would view it as a violation of military discipline and it would be impossible to draw the line. Is that correct?
>
> A. That is correct essentially.
>
> Q. In fact, if there were an exception for religious-belief-motivated departures from Air Force code, Air Force dress code, then such departures would be authorized by the regulations, would they not?
>
> A. Presumably.
>
> Q. And, consequently, people who would wear clothing such as a yarmulke, which is a departure from the Air Force code pursuant to that exception, would not be violating the Air Force regulation. Is that right?
>
> A. If specifically authorized, yes, sir.

The Air Force acknowledged in response to interrogatories that "although not specifically addressed in AFR 35-10," yarmulkes may be worn "during scheduled religious observances" and "while attending Sabbath or holy day services" (J.A. 25-26). Thus it is plain that the Air Force has, of its own accord, already recognized the validity of a religious exemption from the Dress Code for certain times and places.

By the same token, the Air Force has acknowledged the validity of exemptions from grooming requirements for those who are unable to shave because they suffer from pseudofolliculitis (ingrown hairs) (J.A. 24). This exemption — for a reason that is not constitutionally protected — apparently does not give rise to the feared disruption of discipline and morale that is cited in response to the wearing of a yarmulke. Yet it is impossible for the ordinary onlooker to know whether a beard is grown for medical reasons or because of a personal preference, while the wearing of a yarmulke is plainly a recognizable religious observance. And more men are likely to want to wear beards for personal reasons than are likely to seek to wear skullcaps for nonreligious reasons. Hence resentment from other military personnel is far more likely in the case of an exempted beard than in the case of an exempted skullcap. Nonetheless, the Air Force has readily allowed the medical exception while denying the religious.

These factors demonstrate that little harm, if any, would result from a regulatory exception from the Dress Code for religiously mandated articles of clothing such as skullcaps. Even under the greater leeway given to the military in recent decisions of this Court, there is no reason why such an exemption should not be authorized.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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